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CITATIONS

531995—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1033

PAUL DOUCHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 151–158) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 15, 1943 (R. 151). The petition for a writ of certiorari was filed May 18, 1943. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial judge committed reversible error in reading, at the outset of his charge, portions of the statute relating to offenses not charged in the indictment.

STATUTE INVOLVED

Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52b), as amended by the Act of May 27, 1926 (44 Stat. 665), provided in part:

> (b) A person shall be punished by imprisonment for a period of not to exceed five years upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, trustee, United States marshal, or other officer of the court charged with the control or custody of property, or from creditors in composition cases, any property belonging to the estate of a bankrupt; or (2) made a false oath or account in, or in relation to any proceeding in bankruptcy; or (3) presented under oath any false claim for proof against the estate of a bankrupt * * *

Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52b), as amended by the Act of June 22, 1938 (52 Stat. 855–856), provides in part:

> (b) A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000.00, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, cus-

todian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this title, any property belong to the estate of a bankrupt; or (2) made a false oath or account in or in relation to any proceeding under this title; (3) presented under oath any false claim for proof against the estate of a bankrupt, * * *

STATEMENT

Petitioner was indicted in the District Court of the United States for the Eastern District of Michigan on two counts charging concealment, on August 15, 1936, from Theodore Hughes, his trustee in voluntary bankruptcy, of real estate bonds of a par value of $6,200 and $20,000 (R. 113–115). The bonds were originally purchased in petitioner's name, for a time held in the name of Earle W. Evans, and in 1936 transferred to Mike Prodanov (R. 33), petitioner's brother (R. 49). Petitioner contended that the bonds were at all times his brother's property, having been purchased with the profits of an apartment house owned by the brother (R. 50–51, 54–55). The circuit court of appeals found that the evidence with respect to such property, most of which was introduced by the defense (R. 36–39, 40, 44, 45), supported the conclusion that petitioner owned the bonds at the time of the bankruptcy (R. 154).[1]

[1] A detailed analysis of the evidence appears in the opinion of the circuit court of appeals (R. 152–155) and is not given

The government, by the testimony of petitioner's broker, and by cross-examination of petitioner, brought out facts tending to prove that the apartment house and the bonds were registered in other names in order to avoid their attachment by petitioner's creditors (R. 31, 32, 56, 58, 59, 61).

At the outset of his charge to the jury, the trial judge read the first part of Section 29 (b) of the Bankruptcy Act, as amended in 1938,[2] omitting the punishment, but including the list of persons—receiver, custodian, marshal, creditors—mentioned in the section relating to concealment, and the section relating to false oaths (R. 87). Immediately thereafter he stated that the charge was in two counts for wilfully, knowingly, and fraudulently concealing two groups of bonds (R. 88). Later, in summarizing the contentions of both sides, the judge set forth the government's claim that petitioner, "because he was harassed by creditors, sought to play fast and loose with the property" (R. 91). He specifically instructed

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here since petitioner does not challenge the sufficiency of the evidence to support the conviction.

[2] The statute in effect at the time charged in the indictment was Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52 b) as amended by the Act of May 27, 1926 (44 Stat. 665) rather than as amended by the Act of June 22, 1938 (52 Stat. 855–856). The applicable sections of the two statutes are set forth, *supra*, pp. 2–3. Insofar as material, the only difference is that the 1926 amendment limits concealment from creditors to composition proceedings, whereas the 1938 amendment refers to creditors "in any proceeding under this title."

the jury that events occurring before or after the bankruptcy were unimportant except as they bore upon petitioner's assets at the time of bankruptcy (R. 94). At the conclusion of his charge, the judge asked if further instructions were desired. Petitioner's attorney made one request—that the jury be instructed that petitioner must be found the sole owner—to which the judge acceded (R. 97). No objections were made to the charge.

Petitioner was found guilty and sentenced to serve a term of two years' imprisonment on each count, the sentences to run concurrently (R. 98). A motion to set aside the verdict (R. 137–146) was denied (Pet. 6). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment below was affirmed (R. 151).

ARGUMENT

Petitioner's sole contention (Pet. 6–7, 11–20) is that the inclusion in the judge's charge of inapplicable portions of the statute enabled the jury to base its verdict upon the commission of an offense not charged in the indictment. He complains particularly (Pet. 6–7, 12–13) that, in view of the evidence that petitioner had transferred his property in fraud of creditors, the verdict might have been founded on the 1938 amendment with respect to creditors. However, the charge as a whole,[3]

[3] It is settled that the trial court's charge to the jury must be considered in its entirety. *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *Martin* v. *United States*, 100

and the proceedings at the trial, show that the jury could not possibly have been misled.

After reading the statute, the trial judge specified that the charge was concealment of the bonds (R. 88). Then he pointed out to the jury that petitioner's defense was that he had never owned the bonds (R. 88). The jury could not have been misled. Throughout the trial it had been made clear that the concealment charged was from the trustee named in the indictment. Thus, early in the trial, the prosecutor explained before the jury that the introduction of the bankruptcy records was necessary to show the appointment of the trustee mentioned in the indictment (R. 13), and there was considerable testimony with respect to the trustee's appointment and qualification (R. 14–16). When the testimony concerned a successor trustee, the colloquies between court and counsel clearly indicated that defendant was indicted and could be convicted only for concealment from the first trustee (R. 20, 30). The importance of the first trustee was further emphasized by the colloquies before the jury regarding the procedure for getting the testimony of the first

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F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *United States* v. *McCann*, 32 F. (2d) 540, 542 (C. C. A. 2), certiorari denied, 280 U. S. 559; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735; see, also, *Clarke* v. *United States*, 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, No. 776, this term, April 19, 1943; *United States* v. *Schenck*, 126 F. (2d) 702, 708, (C. C. A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705.

trustee (R. 34–35), and by the concession made by defendant's counsel, in lieu of such testimony, that the bonds were never turned over to the first trustee (R. 35–36). The testimony with respect to petitioner's difficulties with creditors prior to the bankruptcy (R. 31, 32, 42, 56, 58, 59, 61) was not likely to mislead the jury; it was relevant to the issue of petitioner's beneficial ownership of the bonds and his motive in registering title in another name (*United States* v. *Martel,* 103 F. (2d) 343, 344–345 (C. C. A. 2); *Arine* v. *United States,* 10 F. (2d) 778, 779 (C. C. A. 9); *Beaux Art Dresses* v. *United States,* 9 F. (2d) 531, 533 (C. C. A. 2), certiorari denied *sub nom. Todd* v. *United States,* 270 U. S. 644). In any event, any possibility that the jury might be misled was countered by the clear instruction that anything occurring prior to the bankruptcy was unimportant except as it tended to prove ownership of the bonds at the time of bankruptcy (R. 94).

By the conclusion of the trial, it was patent that the case turned, not upon whether the concealment had been from the trustee or from the creditors, but upon whether petitioner or his brother was the true owner of the bonds (cf. R. 31). That issue was clearly emphasized throughout the charge (R. 88, 92, 93, 94, 97). The proof that petitioner was the owner was so overwhelming that petitioner does not challenge the sufficiency of the evidence to sustain the conviction. It is therefore evident that the reading of the inapplicable portions of the statute could not have influenced the jury's

verdict and does not constitute reversible error (cf. *Clarke* v. *United States,* 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, No. 776, this term, April 19, 1943; *Martin* v. *United States,* 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *McNeil* v. *United States,* 85 F. (2d) 698, 704 (App. D. C.); *Britton* v. *United States,* 60 F. (2d) 772, 773–774 (C. C. A. 7), certiorari denied, 287 U. S. 669; *Burnstein* v. *United States,* 55 F. (2d) 599, 607 (C. C. A. 9), certiorari denied, 286 U. S. 550), a conclusion which is emphasized by the fact that petitioner's trial counsel, who heard the charge when it was given to the jury, did not then believe it to be confusing and requested only one change, which the judge promptly made.

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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